Supreme Court, U.S.
FILED
JAN 30 2004

No. 031117

In The
Supreme Court of the United States

ARPAN GUPTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record

THE SCHAFFER FIRM
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Petitioner Arpan Gupta

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is a waiver of the right to appeal the correctness of an undetermined sentence invalid where the plea agreements were ambiguous and the District Court gave contradictory advice regarding the right to appeal?

2. Does a district court have jurisdiction to correct a sentence more than seven days after it orally pronounces the sentence but within seven days of entering a written judgment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. THE COURT OF APPEALS ERRED IN UPHOLDING THE VALIDITY OF A WAIVER OF THE RIGHT TO APPEAL THE CORRECTNESS OF UNDETERMINED SENTENCES WHERE THE PLEA AGREEMENTS WERE AMBIGUOUS AND THE DISTRICT COURT GAVE CONTRADICTORY ADVICE REGARDING THE RIGHT TO APPEAL	4
II. THE COURT OF APPEALS ERRED IN HOLDING THAT A DISTRICT COURT LACKS JURISDICTION TO CORRECT A SENTENCE MORE THAN SEVEN DAYS AFTER IT ORALLY PRONOUNCES THE SENTENCE BUT WITHIN SEVEN DAYS OF ENTERING A WRITTEN JUDGMENT	8
CONCLUSION	10

INDEX TO APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit 1a

Appendix B

Order denying rehearing and rehearing *en banc* 4a

TABLE OF AUTHORITIES

Page

CASES

Everard v. United States, 102 F.3d 763 (6th Cir. 1996) 7

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995) 9

United States v. Andis, 333 F.3d 886 (8th Cir. 2003) (*en banc*) 6

United States v. Austin, 217 F.3d 595 (8th Cir. 2000) 9

United States v. Buchanan, 59 F.3d 914 (9th Cir. 1995) 7

United States v. Clay, 37 F.3d 338 (7th Cir. 1994) 9

United States v. Fisher, 232 F.3d 301 (2d Cir. 2000) 7

United States v. Galvan-Perez, 291 F.3d 401 (6th Cir. 2002) 9

United States v. Gonzalez, 163 F.3d 255 (5th Cir. 1998) 8, 9

United States v. Gupta, 2003 WL 22303068 (5th Cir. 2003) 4

United States v. Layman, 116 F.3d 105 (4th Cir. 1997) 9

United States v. Lopez, 26 F.3d 512 (5th Cir. 1994) 8

United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998) 7

United States v. Melancon, 972 F.2d 566 (5th Cir. 1992) 6, 7

United States v. Morillo, 8 F.3d 864 (1st Cir. 1993) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Morrison, 204 F.3d 1091 (11th Cir. 2000) 9

United States v. Navarro-Espinosa, 30 F.3d 1169 (9th Cir. 1994) 9

United States v. Rosa, 123 F.3d 94 (2d Cir. 1999) 7

United States v. Teeter, 257 F.3d 14 (1st Cir. 2001) 6

United States v. Townsend, 33 F.3d 1230 (10th Cir. 1994) 9

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V 1

FEDERAL STATUTE

28 U.S.C. § 1254(1) 1

RULES

FED. R. CRIM. P. 35(c) (2002) 3, 4, 8

SUP. CT. R. 10(b) 7, 9

MISCELLANEOUS

Andrew P. Rittenberg, Comment, *"Imposing" a Sentence Under Rule 35(c)*, 65 U. CHI. L. REV. 285 (1998) 8

PETITION FOR A WRIT OF CERTIORARI

Arpan Gupta respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit affirming the convictions and dismissing the appeal from the sentences is not reported (Appendix A). The order denying rehearing and rehearing *en banc* is not reported (Appendix B).

JURISDICTION

The Fifth Circuit affirmed the judgment on October 8, 2003, and denied rehearing and rehearing *en banc* on November 6, 2003. This petition is being filed within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall . . . be deprived of . . . liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner pled guilty to structuring financial transactions and entered into three plea agreements that contained waivers of the right to appeal the sentences. The waivers were in conflict and the District Court gave contradictory advice regarding his appellate rights.

There is a conflict among the circuits regarding whether these waivers are enforceable. Most circuits agree that there are limits to their enforceability. For example, some do not enforce waivers that are ambiguous or would lead to a miscarriage of justice. The Second Circuit held that a waiver virtually identical to the one in petitioner's case was unenforceable. Two other circuits held that a district court's contradictory, post-sentence advice regarding appellate rights trumps the waivers in the plea agreements, and another circuit held that such advice weighs against enforcing a waiver. However, the Fifth Circuit held that a district court's contradictory statements do not nullify an otherwise valid waiver. This Court should resolve the conflict, as due process does not permit different standards for determining the validity of a waiver of the right to appeal an undetermined sentence.

The District Court, citing lack of jurisdiction, did not consider petitioner's motion to correct the sentences because there was no hearing within seven days of the oral pronouncement of the sentence even though the Court had not entered a written judgment. There is a conflict among the circuits regarding whether a district court "imposes" a sentence when it orally pronounces the sentence or when it enters the written judgment. The Fifth Circuit held that

"imposition" of sentence means the date of oral pronouncement. This Court should resolve the conflict, as due process does not permit different standards for determining when a district court loses jurisdiction to consider a motion to correct the sentence.[1]

B. Procedural History

Petitioner was indicted in the Southern District of Texas, Houston Division, for various property offenses. Pursuant to a plea agreement, he pled guilty to three counts of structuring, and the government agreed to dismiss the other counts.

Thereafter, petitioner was charged in the Northern District of Texas, Dallas Division, in a superseding indictment, with additional property offenses.[2] He entered into a plea agreement in the Northern District. The case was transferred to the Southern District for consolidation. He entered into a second plea agreement that expressly incorporated the terms of the Northern District plea agreement. He pled guilty to four counts of structuring, and the government agreed to dismiss the other counts.

Petitioner objected to the Pre-Sentence Investigation Report because, *inter alia*, the probation officer erroneously calculated the amount of funds structured. The

---

[1] Although Federal Rule of Criminal Procedure 35 was amended effective December of 2002, presumably to clarify this ambiguity, the issue is sufficiently important to grant certiorari, as it impacts the cases that pre-date the amendment.

[2] The Northern District indictment alleged conduct that occurred before the date that the Southern District indictment was returned.

District Court overruled the objections and assessed concurrent 21-month prison terms on July 8, 2002. Petitioner moved to correct the sentence, pursuant to Federal Rule of Criminal Procedure 35(c), on July 12. The District Court denied the motion for lack of jurisdiction on September 4 and entered a written judgment.

The Fifth Circuit affirmed the conviction and dismissed the appeals from the sentences in an unpublished opinion issued on October 8, 2003, and denied rehearing and rehearing *en banc* on November 6, 2003. *United States v. Gupta*, 2003 WL 22303068 (5th Cir. 2003).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE VALIDITY OF A WAIVER OF THE RIGHT TO APPEAL THE CORRECTNESS OF UNDETERMINED SENTENCES WHERE THE PLEA AGREEMENTS WERE AMBIGUOUS AND THE DISTRICT COURT GAVE CONTRADICTORY ADVICE REGARDING THE RIGHT TO APPEAL.

Each plea agreement contained a waiver of the right to appeal the sentence. In the Northern District case, the plea agreement contained a general waiver of the right to appeal but permitted petitioner to appeal mathematical errors in the guideline calculations and ineffective assistance of counsel.[3] When that case was transferred to the

[3] The Sentence Data Sheet filed the same day as the plea agreement reflects these exceptions to the waiver.

Southern District, petitioner entered into a second plea agreement that expressly incorporated the terms of the Northern District agreement, which was attached as an exhibit. Although the Southern District agreement does not include the right to appeal mathematical errors in the guideline calculations, the fully incorporated Northern District agreement does. Thus, the plea agreements, considered collectively, are ambiguous with respect to the waivers.

The District Court made conflicting statements to petitioner regarding the right to appeal the sentences. While the lawyers and the Court may have understood these statements, the record does not reflect that anyone explained them to petitioner. At the rearraignment on the Southern District case, the Court stated that the plea agreement was not necessarily binding and if it "determines in its discretion that the punishment should be greater than some particular amount," petitioner could not withdraw the plea but "does have a right of appeal." Immediately thereafter, it stated, "If I sentence you within the guidelines, you don't have the right to appeal the conviction or the punishment." At sentencing, it stated, "You have the right to appeal the sentence that is imposed, that is, the rulings that the Court has made. . . . [The waiver] does not waive appeal of the sentence imposed because I don't believe you had an agreement on the sentence itself."[4]

---

[4] Moments later, the prosecutor said, "Your Honor, I may be incorrect, but I believe that the plea agreements do probably provide for the waiver of appeal at sentence." The Court replied, "I am not sure. I

(Continued on following page)

At issue is whether a waiver of the right to appeal the correctness of an undetermined sentence is enforceable where the plea agreements were ambiguous and the district court gave contradictory advice regarding the right to appeal. Petitioner contended that the waivers are unenforceable because they were ambiguous and would lead to a miscarriage of justice. However, the Fifth Circuit enforced the waivers and dismissed the appeal, relying on *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992).

The circuits are split on when to enforce such a waiver. The First and Eighth Circuits recognize that a waiver of appellate rights is subject to limitations. *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) ("[B]ecause such waivers are made before any manifestation of sentencing error emerges, appellate courts must remain free to grant relief from them in egregious cases."); *United States v. Andis*, 333 F.3d 886, 888 (8th Cir. 2003) (*en banc*). A plea agreement is strictly construed; where it is ambiguous, the ambiguity is construed against the government and in favor of a defendant's appellate rights. *Id.* at 890. An otherwise valid waiver is unenforceable if it would result in a miscarriage of justice. *Id.* at 891. For example, a sentence not authorized by law constitutes a miscarriage of justice. *Teeter*, 257 F.3d at 26. There is no logical distinction between a sentence that violates the guidelines and a sentence that violates a statute. *Andis*, 333 F.3d at 894 (Arnold, J., concurring). An appellate court also may refuse to enforce a waiver when the district court plainly erred at sentencing. *Teeter*, 257 F.3d at 25.

---

don't have it before me, so I am just giving the admonition in the event there is a basis for appeal."

The Second Circuit held that a waiver virtually identical to the one in petitioner's case was unenforceable. *United States v. Martinez-Rios*, 143 F.3d 662, 668-69 (2d Cir. 1998). A waiver that denies the defendant the opportunity to appeal the correctness of an undetermined guideline range is an "unorthodox agreement" that "presents grave dangers and implicates both constitutional questions and ordinary principles of fairness and justice." *United States v. Rosa*, 123 F.3d 94, 99 (2d Cir. 1999).

The Sixth and Ninth Circuits held that a district court's contradictory advice regarding appellate rights invalidates an otherwise valid waiver. *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995) (court's statement that defendant may appeal sentence trumps contrary language in plea agreement); *Everard v. United States*, 102 F.3d 763, 766 (6th Cir. 1996) (defendant would not know whether waiver of appeal in plea agreement or court's statement regarding right to appeal controlled). The Second Circuit recognized that a district court's contradictory statements do not nullify a waiver but weigh heavily toward the conclusion that the waiver is ambiguous and should not be enforced. *United States v. Fisher*, 232 F.3d 301, 304 n.2 (2d Cir. 2000). At the other end of the spectrum, the Fifth Circuit held that a district court's contradictory, post-sentence advice regarding appellate rights does not nullify an otherwise valid waiver. *Melancon*, 972 F.2d at 568. Due process cannot permit different standards for determining the validity of a waiver of the right to appeal an undetermined sentence. Accordingly, this Court should grant certiorari to resolve the conflict among the circuits on this important question. SUP. CT. R. 10(b).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT A DISTRICT COURT LACKS JURISDICTION TO CORRECT A SENTENCE MORE THAN SEVEN DAYS AFTER IT ORALLY PRONOUNCES THE SENTENCE BUT WITHIN SEVEN DAYS OF ENTERING A WRITTEN JUDGMENT.

The District Court orally pronounced petitioner's sentence on July 8, 2002, but did not enter a written judgment. Petitioner moved to correct the sentence on July 12. At the hearing on September 4, the District Court concluded that it lacked jurisdiction because more than seven days had elapsed since the oral pronouncement of the sentence. It entered the written judgment that same day.

A district court, "*acting within 7 days after the imposition of sentence*, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(c) (2002) (emphasis added). The seven-day period is jurisdictional. *United States v. Lopez*, 26 F.3d 512, 518-19 (5th Cir. 1994).

At issue is whether a sentence is "imposed" when the district court orally pronounces the sentence or when it signs the judgment. Petitioner contended that the District Court had jurisdiction to consider the motion because the date judgment is entered determines when the sentence is "imposed" for Rule 35(c) purposes. *See* Andrew P. Rittenberg, Comment, *"Imposing" a Sentence Under Rule 35(c)*, 65 U. CHI. L. REV. 285 (1998) (surveying cases and concluding that entry of judgment is correct point of measurement).

The Fifth Circuit rejected petitioner's contention based on *United States v. Gonzalez*, 163 F.3d 255 (5th Cir.

1998). The circuits are split on this important question. The Second, Fourth, Fifth, Tenth, and Eleventh Circuits have held that "imposition" of sentence means the date of oral pronouncement. *United States v. Abreu-Cabrera*, 64 F.3d 67 (2d Cir. 1995); *United States v. Layman*, 116 F.3d 105 (4th Cir. 1997); *United States v. Gonzalez*, *supra*; *United States v. Townsend*, 33 F.3d 1230 (10th Cir. 1994); *United States v. Morrison*, 204 F.3d 1091 (11th Cir. 2000). The First and Seventh Circuits have held that it refers to the date the written judgment is entered. *United States v. Morillo*, 8 F.3d 864, 869 n.8 (1st Cir. 1993); *United States v. Clay*, 37 F.3d 338 (7th Cir. 1994). The Eighth Circuit is poised to address the issue, *United States v. Austin*, 217 F.3d 595, 597 (8th Cir. 2000), and the Sixth and Ninth Circuits have recognized but not decided it. *United States v. Galvan-Perez*, 291 F.3d 401 (6th Cir. 2002); *United States v. Navarro-Espinosa*, 30 F.3d 1169, 1170-71 (9th Cir. 1994). Due process cannot permit different standards for determining when a court loses jurisdiction to consider a motion to correct the sentence. Accordingly, this Court should grant certiorari to resolve the conflict among the circuits on this important question. SUP. CT. R. 10(b).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, vacate the judgment of the Fifth Circuit, and remand to the District Court for consideration of the motion to correct the sentence or, in the alternative, remand to the Fifth Circuit for consideration of the merits of the appeal.

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record

THE SCHAFFER FIRM
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net (e-mail)

Counsel for Petitioner
Arpan Gupta

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20846
c/w No. 02-20847
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARPAN GUPTA,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. H-02-CR-96-1

(Filed October 8, 2003)

PER CURIAM.*

Arpan Gupta appeals three of his convictions and sentences imposed following his pleas of guilty to seven counts of structuring currency transactions to evade reporting requirements. Gupta was sentenced to terms of

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

imprisonment of 21 months on each count, the terms to run concurrently.

Gupta argues that the district court plainly erred in determining that there were adequate factual bases for his pleas because his conduct did not constitute a crime. He argues that the bank from which he purchased multiple cashier's checks in amounts less than $10,000 had a duty to treat the transactions as a single transaction and to report them in accord with 31 C.F.R. § 103.22(c)(2). He argues that because his transactions were in effect a single transaction, he was not evading the reporting requirement.

The record reflects that Gupta knew of the relevant reporting requirements and knowingly structured currency transactions in order to evade reports on his withdrawals. The district court did not plainly err in determining that there was an adequate factual basis for Gupta's guilty pleas. *See* 31 U.S.C. § 5324(a)(3); *United States v. Threadgill,* 172 F.3d 357, 371 (5th Cir. 1999).

Gupta also challenges the manner in which his guideline sentences were determined and also argues that the district court erred in denying his FED. R. CRIM. P. 35 motion to reduce his sentence for lack of jurisdiction. The Government argues that Gupta waived his right to appeal his sentence in the plea agreements and that the court should enforce the appeal waiver provisions.

A review of the record refutes Gupta's arguments that the waiver provisions were ambiguous or that the district court gave him conflicting information regarding the waiver during his rearraignment. The waiver provisions were clearly stated in the plea agreements signed by Gupta and the plea agreements, including the waivers,

were discussed during the rearraignment hearing. Gupta was given the opportunity to question the court about any provisions in the plea agreements. There was no indication in the record that Gupta was confused about the nature of the waiver provisions. The record reflects that Gupta knowingly and voluntarily gave up his right to appeal his sentences, except for the limited noted exclusions. *See United States v. Melancon,* 972 F.2d 566, 567 (5th Cir. 1992).

Gupta's challenge to the denial of his FED. R. CRIM. P. 35 motion to reduce his sentence is dismissed as MOOT.

Based on the appeal waivers, Gupta's appeal from the sentences imposed should be DISMISSED. Gupta's conviction is AFFIRMED. *See United States v. Baymon,* 312 F.3d 725, 730 (5th Cir. 2002).

CONVICTION AFFIRMED; APPEAL FROM SENTENCES DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20846

---

consolidated w/ 02-20847

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ARPAN GUPTA

Defendant-Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 10/8/03, 5 Cir., _____, _____ F.3d _____)

(Filed Nov. 6, 2003)

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit
Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.